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Supreme Court of the United States

October Term, 1956.

No. ~~1049.~~ 136

CONSTANCE A. STOPPER,

Petitioner,

v.

THE MANHATTAN LIFE INSURANCE COMPANY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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No. 1049.

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OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit is reported at 241 F. 2d 465. The opinion of the United States District Court for the Eastern District of Pennsylvania is unreported, but appears in the record at page 112a.[1]

JURISDICTION.

The jurisdiction of the court is invoked under 28 U. S. C. Section 1254(1) upon a petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

1. All references to exhibits and page references followed by the letter "a" are to pages of the Appendix to Brief for Appellant in the court below, unless otherwise indicated.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether a constitutional question which was not presented at any time to the court below should be considered for the first time upon petition for certiorari; where the question arises from the asserted denial of a right to trial by jury by the entry by a Court of Appeals of judgment notwithstanding the verdict upon a timely motion for judgment in accordance with a motion for a directed verdict under Rule 50(b) of the Federal Rules of Civil Procedure.

2. Whether a decision of a Court of Appeals in a diversity case involving solely a question of state insurance law, decided in accordance with the established principles of the state law as applied to the special facts in evidence, merits review upon petition for certiorari.

STATEMENT OF THE CASE.

Petitioner brought suit in the United States District Court for the Eastern District of Pennsylvania upon two insurance policies which were issued by respondent on July 19, 1951 on the life of petitioner's husband, Eugene A. Stopper, an architect, who died of a heart attack less than three months after the policies were issued. Respondent defended on the ground of fraudulent misrepresentations in the application for insurance, in which the insured denied receiving treatments from a heart specialist during the ten weeks prior to and on the day of the signing of the application, denied ever having suffered from any ailment of the heart, and denied that he had ever been examined for or made any application for life insurance to any other company.

The jury returned a verdict in the amount of $40,000 in favor of petitioner, and respondent's timely motion for judgment in accordance with its motion for a directed

verdict under Rule 50(b) was denied by the District Court (1a, 109a, 112a). Respondent appealed from the denial of this motion to the United States Court of Appeals for the Third Circuit. That court, consisting of Chief Judge Biggs and Circuit Judges Goodrich and Hastie, reversed the judgment in favor of petitioner with instructions to enter judgment in favor of respondent (Petitioner's Appendix B, Petition, pp. 16-24).

The two insurance policies in suit (Exhibits P-1 and P-2), in the total amount of $40,000, were issued in connection with a large insurance program to support Stopper's participation in a new partnership, formed specifically to do the engineering work on the now notorious Tobyhanna Signal Corps project (49a-51a, 53a-56a). Part 1 of the application for the policies was dated July 16, 1951 and Part 2 of the application was dated July 13, 1951; both parts were signed by the insured (103a-106a).

In Part 1 of the application Stopper made the following answer to question 7(b):

> "7(b). Is any application [for life, accident or health insurance] or reinstatement, pending or contemplated in any other company? (Give details.)
>
> "No."

In Part 2 of the application Stopper made the following answers to questions:

> "13. Have you ever been examined for or made application to any life, health, or accident insurance company, or have you any application pending, on which a policy has not been issued . . . ?
>
> "No."
>
> "16(b). Have you ever suffered from any ailment or disease of the heart, blood vessels, or lungs?
>
> "No."

"19. What . . . physicians have you consulted or been treated by in the last five years? (Give details below.)

"Dr. Daniel Pearson (sic), 1830 Delancey Street.

"Goes twice yearly to Dr. Pearson (sic) for physical examination. No illness."

Stopper certified that he read the answers and they were full, true and complete (103a, 104a).

The death certificate which petitioner offered in evidence showed that the insured died on October 12, 1951 of a coronary thrombosis (12a, 13a).

Respondent's principal witness was Dr. Daniel B. Pierson, Jr., a specialist in cardiology (25a), who was the insured's personal physician for a long time prior to his death (27a). Dr. Pierson's office records, which were admitted in evidence (Exhibit D-9, 107a-108a), showed that in the period from May 3 to July 13, 1951, the date of Part 1 of the application, Stopper made six visits to his office, complaining of pains around the heart, shortness of breath, sweating and an "all-gone" feeling, none of which he had complained of before (28a, 30a, 31a, 41a). Dr. Pierson prescribed daily medication of aminophylline and other drugs and emergency administration of nitroglycerin for the treatment of angina pectoris (31a-34a).

During the first month of these treatments between May 3 and June 11, Dr. Pierson ordered an electrocardiogram and X-rays of the chest, followed by a Master two-step electrocardiogram at Lankenau Hospital (28a, 29a, 30a). The chest X-ray and the Master two-step electrocardiogram revealed abnormality of the aorta and a condition which Dr. Pierson concluded resulted from a narrowing of the coronary vessels (29a, 30a).

During this period of treatment Dr. Pierson twice ordered Stopper to return for an immediate follow-up, the first time, a week after June 14 (30a), then two days after July 11 (33a). When he reported back on the same day

Part I of the application was signed, July 13, Stopper was still complaining of precordial discomfort (34a). Dr. Pierson therefore prescribed a new drug for angina to be administered once at bedtime and building up to three times a day, and he continued the emergency treatment of nitroglycerin as needed (34a). Dr. Pierson's clinical records showed that during the period May 3 to July 13, 1951, Stopper experienced and complained of more than twelve attacks of heart pains (28a-34a).

Stopper made no reference at all to these heart treatments in his answer to question 19 in the application, and asserted that he consulted Dr. Pierson twice yearly only "for physical examination, no illness" (104a, 106a).

Respondent also offered in evidence an application for life insurance policies made to the Pan American Life Insurance Company in the total amount of $50,000 which was signed by Stopper on June 5, 1951 in Philadelphia (Exhibits D-1 and D-2, 13a-14a). These policies were never issued because Stopper failed to furnish an electrocardiogram and chest X-ray (15a, 17a). Despite repeated telephone requests to Stopper between June 15 and August 2, 1951 (15a-17a), by the Pan American General Agent for this medical information, the current electrocardiogram and chest X-ray were never furnished (17a).

At the close of its case and again at the close of all the evidence respondent moved for a directed verdict (44a, 87a). The motion was denied each time (44a, 87a), and the jury returned a verdict for petitioner (101a).

On appeal to the Court of Appeals for the Third Circuit, Chief Judge Biggs, and Circuit Judges Goodrich and Hastie, in an opinion by Judge Hastie, reversed the judgment of the District Court with instructions to enter judgment for the defendant on two independent grounds: (1) that on the basis of the clinical records of the insured's own heart specialist his "unquestionably false statements" were fraudulent as a matter of Pennsylvania law; and (2) that Stopper's denial of ever having made application to

any life insurance company was also fraudulent as a matter of law because the documentary evidence showed that the insured executed the Pan American application on June 5, 1951 in the presence of the medical examiner just five weeks before the pertinent denial in respondent's application (Petitioner's Appendix B, Petition, pp. 16-24).

Petitioner filed a petition for rehearing in the court below in which she failed to raise any question of the alleged violation of her constitutional right to a trial by jury under the Seventh Amendment to the United States Constitution. The court below denied this petition without opinion (Petitioner's Appendix D, Petition, p. 26).

Subsequently, this petition for a writ of certiorari was filed alleging that petitioner's right to a trial by jury under the Seventh Amendment had been violated by the entry of judgment notwithstanding the verdict by the court below, and that the decision of the court was not in accordance with the Pennsylvania law.

SUMMARY OF RESPONDENT'S ARGUMENT.

The petition for certiorari should be denied for the following reasons:

1. The consfitutional question concerning the alleged violation of petitioner's right to trial by jury under the Seventh Amendment to the United States Constitution was not presented to or decided by the court below, and it should therefore not be considered for the first time upon a petition for certiorari. Petitioner's constitutional right was not infringed because the court followed the procedure prescribed by the Federal Rules of Civil Procedure in entering judgment notwithstanding the verdict upon respondent's timely motion under Rule 50(b) for judgment in accordance with its motion for a directed verdict.

2. The case involves only the application of well established principles of Pennsylvania insurance law to the special facts in evidence, and it was decided in complete accord with the decisions of the Pennsylvania courts. It does not merit review upon petition for certiorari.

ARGUMENT.

I. The Constitutional Question Which Petitioner Attempts to Raise Here Was Not Presented to the Court Below and Should Therefore Not Be Considered.

For the first time in her petition for certiorari petitioner claims that the court below deprived her of the right to trial by jury in violation of the Seventh Amendment to the United States Constitution (First Question Presented for Review, Petition, p. 2). This question should not be considered by this court because it was not presented to or decided by the court below.

At no stage of the proceedings in the District Court or in the Court of Appeals was there any suggestion that the entry of judgment notwithstanding the verdict on defendant's motion under Rule 50(b) of the Federal Rules of Civil Procedure would deprive petitioner of her right to trial by jury in violation of the Seventh Amendment. Not even in the petition for rehearing, which was filed after the adverse decision below, did petitioner contend that her constitutional right had been infringed. Generally, a constitutional question raised for the first time in a petition for reargument and not decided by the court below, comes too late for review by this court. *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120, 128 (1945); *American Surety Co. v. Baldwin*, 287 U. S. 156 (1932); *Herndon v. Georgia*, 295 U. S. 441 (1935).[2] *A fortiori* where a constitutional question is not raised at all in the court below, even in a petition for rehearing, it will not be considered for the first time here. *Trailmobile Co. v. Whirls*, 331 U. S. 40, 50

2. *Herndon* is frequently cited in per curiam decisions dismissing for want of jurisdiction. See, for example, *Southwestern Bell Telephone Co. v. Lee*, 311 U. S. 609 (1940); *Saenger Realty Corp. v. Grosjean*, 310 U. S. 613 (1940); *W. T. Carter & Bros. v. Short*, 308 U. S. 513 (1939).

(1947); *Wong Tai v. United States*, 273 U. S. 77, 78-79 (1927); *Rodriquez v. Vironi*, 201 U. S. 371, 377 (1906).

Even though this impediment to review by this court did not exist, the court should not consider the alleged constitutional question because the Court of Appeals followed the established procedure under the Federal Rules of Civil Procedure in reversing the judgment in favor of petitioner with directions to enter judgment in favor of respondent. See *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243, 254 (1940). At the close of its case and again at the close of all the evidence respondent made its motion for a directed verdict under Rule 50 (44a, 87a). These motions were denied (44a, 87a). After the verdict in favor of petitioner, respondent filed a timely motion for judgment in accordance with its motion for a directed verdict (1a, 109a), thus preserving for the Court of Appeals the legal question of the sufficiency of the evidence to support petitioner's verdict. When that motion was denied by the District Court (112a) respondent appealed to the Court of Appeals.[3]

The procedure under Rule 50 in the federal courts is essentially similar to the procedure under the Pennsylvania law by which a party who has moved for a directed verdict in the trial court may preserve a legal question for review by the Supreme Court, which is empowered to enter judgment notwithstanding the verdict after the denial of the motion by the trial court. Act of May 20, 1891, P. L. 101 § 2, 12 P. S. 1164. See *Johnson v. New York, New Haven & Hartford R. Co.*, 344 U. S. 48, 52-53 (1952). This statutory procedure has often been followed by the Pennsylvania Supreme Court in entering judgment for defendant notwithstanding the verdict in insurance cases like this one, where bad faith is inferred as a matter of law from documentary evidence showing recent medical consultation and

3. Respondent also appealed from the denial by the District Court of its motion for a new trial, but in view of the decision of the Court of Appeals on the motion for judgment, that ruling was not considered by the court below.

treatment which was not disclosed in an insurance application. *Freedman v. Mut. Life Ins. Co. of N. Y.*, 342 Pa. 404, 21 A. 2d 81 (1941); *Derr v. Mut. Life Ins. Co. of N. Y.*, 351 Pa. 554, 41 A. 2d 542 (1945); *Kizirian v. United Beneficial Life Ins. Co.*, 383 Pa. 515, 119 A. 2d 47 (1956).

This court has frequently considered the application of Rule 50(b) of the Federal Rules of Civil Procedure. See *Johnson v. New York, New Haven & Hartford R. Co.*, 344 U. S. 48 (1952); *Cone v. West Virginia Pulp & Paper Co.*, 330 U. S. 212 (1947); *Globe Liquor Co., Inc. v. San Roman*, 332 U. S. 571 (1948); *Fountain v. Filson*, 336 U. S. 681 (1949). In all of these cases the court has recognized that if the party against whom a verdict is returned has moved for a directed verdict and after an adverse verdict files a timely motion under Rule 50(b) for judgment in accordance with its motion for a directed verdict, the Courts of Appeals are empowered to enter judgment notwithstanding the verdict. In none of these cases was it ever suggested that to do so would deprive the party in whose favor the verdict was rendered of its right to a trial by jury in violation of the Seventh Amendment to the Constitution.[4] In fact, as this court observed in the *Johnson* case, *supra*, at 344 U. S. p. 52, the very object of Rule 50(b) was to provide "a precise plan" by which a party could obtain a judgment notwithstanding the verdict in the federal courts, unimpeded by the procedural hazards which had been encountered in the earlier cases. See, for example *Slocum v. New York Life Ins. Co.*, 228 U. S. 364 (1913); *Aetna Insurance Co. v. Kennedy*, 301 U. S. 389 (1937).

There was no violation of petitioner's constitutional right to a jury trial in the procedure followed by the Court

4. Before the Federal Rules of Civil Procedure were promulgated, it was held that the entry of judgment notwithstanding the verdict by a Court of Appeals in a diversity action did not violate the right of trial by jury guaranteed to a party in the federal courts by the Seventh Amendment. *Baltimore & Carolina Lines, Inc. v. Redman*, 295 U. S. 654 (1935).

of Appeals.[5] Since the alleged constitutional question was not presented to or decided by the court below, it should not be considered by this court for the first time upon petition for certiorari.

II. This Case Does Not Merit Review Upon Certiorari Because It Involves Only the Application of Well-Established Principles of Pennsylvania Law to the Special Facts in Evidence and It Was Decided in Complete Accord With the Decisions of the Pennsylvania Courts.

As the Supreme Court of Pennsylvania has done many times, the Court of Appeals in this case inferred from the documentary evidence that the insured's misstatements in his application for insurance were fraudulent as a matter of law and entered judgment notwithstanding the verdict. Far from presenting questions of "important and . . . far reaching effect," as petitioner contends (Petition, p. 14), this case only involves the application of long recognized principles of Pennsylvania law to the special facts which were established by the documentary evidence. Such a case does not merit review upon petition for certiorari.

The court below based its decision upon two separate grounds, each of which was self-sustaining and would alone have supported the entry of judgment in respondent's favor. First, the court concluded that on the uncontradicted documentary evidence from the records of the insured's own physician there was "a clear picture of willful misrepresentation in answer to Manhattan's inquiry about recent medical consultation and treatment" (Petitioner's Appendix B, Petition, p. 21). Secondly, the court decided

5. Cases under the Federal Employers' Liability Act, such as *Wilkerson v. McCarthy*, 336 U. S. 53 (1949), *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29 (1944), *Rogers v. Missouri P. R. Co.*, 352 U. S. 500 (1957), and *Webb v. Illinois Central R. Co.*, 352 U. S. 512 (1957) and cases under the Jones Act such as *Ferguson v. Moore-McCormack Lines*, 352 U. S. 521 (1957), upon which petitioner relies, are not in point.

that "while the knowingly false statement of the insured concerning the nature and frequency of his recent visits to Dr. Pierson was in itself a sufficient ground for directing a verdict for the insurer, we find it equally clear that Stopper made a willfully false statement in answer to an inquiry about other insurance applications" (Petitioner's Appendix B, Petition, p. 23). In reaching these conclusions the court applied the Pennsylvania law correctly.

Petitioner pretends to find a new rule in the decision of the court below under which the court set "its own standards to determine the fact of misrepresentation, instead of following the law of the State forum" (Petition, p. 14). She argues that the court concluded, "contrary to the law of Pennsylvania," that "a knowingly false statement by an applicant establishes a conclusive presumption of fraud which permits no evidence to the contrary" (Petition, p. 8). These arguments are entirely without foundation.

Far from disregarding the law of Pennsylvania, the Court of Appeals followed it scrupulously and, in fact, accepted as the basis for its decision *petitioner's own statement* of that law which appeared in her brief filed in the court below. As Judge Hastie stated in his opinion: "Appellee's [petitioner's] brief properly recognizes that under the law of Pennsylvania, as applicable to a case like this, the trial court should direct a verdict for the insurer 'if the uncontradicted documentary evidence shows that statements in the application were false and that insured either knew they were false, or otherwise acted in bad faith in making them' " (Petitioner's Appendix B, Petition, p. 21). This statement of the Pennsylvania law was adopted verbatim from petitioner's own brief filed below (See Respondent's Appendix, p. 19), and it correctly states the law which is uniformly applied by the Pennsylvania Supreme Court in cases of this kind.

In *Evans v. Penn Mut. Life Ins. Co.*, 322 Pa. 547, 186 Atl. 133 (1936), where petitioner purports to find a rule

different from that which was applied by the Court of Appeals here, the Pennsylvania Supreme Court stated (at 322 Pa. 553-554, 186 Atl. 138):

> "The insurer must thus establish, in order to avoid the policy in the case of misrepresentations, that the statements relied on were falsely and fraudulently made. It is sufficient to show that they were false in fact and that insured knew they were false when he made them [citation omitted], since an answer known by insured to be false when made is presumptively fraudulent . . . *The circumstances preceding and attending the making of the statements may be such that the insured must be said to have been aware of their falsity at the time, or that an inference of fraud is otherwise irresistible, as for instance where an unreported illness or disability of insured was so serious and so recent that he could not have forgotten it.*" (Emphasis supplied.)

From the uncontradicted documentary evidence in the records of the insured's own heart specialist, Dr. Pierson, the court below found as a matter of law, just as the Pennsylvania Supreme Court would have done, that the dramatic, painful and persistent symptoms which the insured reported on his six visits to his physician, the chest X-rays, electrocardiogram, Master two-step electrocardiogram, and the regular medication of drugs and emergency prescriptions of nitroglycerin were significant facts relating to the insured's state of health, the concealment of which could only have been fraudulent. Coupled with his reference in the application to semi-annual visits for physical check-ups by his physician and the statement "no illness", his failure to disclose them could only be construed as willful concealment of recent medical consultations and treatment.

In thus inferring bad faith as a matter of law, from this documentary evidence, the court below followed and

quoted from the leading Pennsylvania case of *Freedman v. Mut. Life Ins. Co. of N. Y.*, 342 Pa. 404, 21 A. 2d 81, (1948), where the Supreme Court of Pennsylvania said, by way of particularizing the rule in the *Evans* case, *supra* (at 342 Pa. 409, 21 A. 2d 84):

> ". . . Thus, where it is established by uncontradicted documentary evidence that the insured has consulted physicians so frequently, or undergone medical or surgical treatment so recently, or of such a serious nature, that a person of ordinary intelligence could not have forgotten these incidents in answering a direct and pointed question in an application for insurance, *bad faith may be inferred as a matter of law if the insured denies in his answer that any physician has been consulted, or any medical or surgical treatment has been received during the period of inquiry.*" (Emphasis supplied.)

That the Supreme Court of Pennsylvania would have entered judgment for respondent notwithstanding the verdict, just as the court below did here, is easily demonstrated by reference to the Pennsylvania cases.[6] In the *Freedman* case, *supra*, the Pennsylvania Supreme Court entered judgment for the defendant on documentary evidence of visits to a number of physicians during a four-year period prior to the date of the application, where the insured denied having consulted any physician in the preceding five-year period. The application was made eight months before he

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6. In the case of *Burton v. Pacific Mut. Life Ins. Co.*, 368 Pa. 613, 84 A. 2d 310 (1951), upon which petitioner principally relies, but which is distinguishable on its facts as the court below pointed out, the Supreme Court of Pennsylvania noted the rule which applies to a case such as this one and said at 368 Pa. 615-616, 84 A. 2d 312: "Thus, where a person who has been treated over a period of time for a heart condition and fails to report it dies of coronary occlusion or coronary thrombosis, his beneficiary may not recover: *Freedman v. Mut. Life Ins. Co. of N. Y.*, 342 Pa. 404, 21 A. 2d 81; *Derr v. Mut. Life Ins. Co.*, 351 Pa. 554, 41 A. 2d 542."

died of a heart attack. There was no evidence that the insured was told or knew that he had a heart condition.

In *Derr v. Mut. Life Ins. Co. of N. Y.*, 351 Pa. 554, 41 A. 2d 542 (1945), the Supreme Court of Pennsylvania entered judgment in favor of the insurance company notwithstanding the verdict in a case where the insured, as here, was "an active, competent businessman" (*id.* at 351 Pa. 559, 41 A. 2d 544) who disclosed in his application the name of his personal physician and admitted only that he had been under his care for colds in the past five years but denied having had any treatment or observation in a hospital. The hospital records showed that almost a year prior to the application the insured had gone there for a check-up which disclosed a small stone in the lower end of the right ureter.

In *Reeder v. Metropolitan Life Ins. Co.*, 340 Pa. 503, 17 A. 2d 879 (1941), the Supreme Court affirmed judgment for the defendant where the insured admitted in his application that he had consulted a physician whose identity was disclosed, but asserted that it was for only a moderate attack of indigestion, and the record showed other consultations for his general physical condition, and advice from one physician to have his heart examined during the seven-month period preceding the application. The insured died of a heart condition nearly two years after the date of the application.

In *Croll v. John Hancock Life Ins. Co.*, 198 F. 2d 562 (3rd Cir. 1952), the court below, following the Pennsylvania law, concluded that the documentary evidence of the insured's physician's office records, showing a number of visits in which he complained of pains in the chest and other chest symptoms with complaints of epigastric and back pains, established fraud as a matter of law.[7] There was

7. The court said (at pp. 564-65): "No juror should be asked to believe that decedent at the time he made his application may have forgotten his chest pains or the electrocardiogram taken in the hospital or the many visits to his physician during a relatively short period of

no evidence that the insured was told of the heart condition of which he died more than a year following the application. The evidence showed that he was actively engaged in operating a gas station and that he continued to perform all the arduous duties connected with it without respite and without being warned to discontinue them by his physician.

From the foregoing cases, and the other cases cited in the opinion of the court below, it is clear that the court correctly applied the Pennsylvania law in entering judgment for respondent notwithstanding the verdict on the first ground of its decision alone.[8]

As to the second ground of the decision, petitioner asserts that the court below "held that the denial of other insurance applications was fraudulent, without regard to the materiality of the statement" (Petition, p. 9). She then states, without any supporting authority whatever, that "where there has not been a rejection of the risk, the negative answer is immaterial and such immateriality makes the good faith of the insured, in so answering, a question of fact and not of law which must be decided by a jury" (Petition, p. 9). This was not the holding of the court below and, in fact, there is no such principle in the Pennsylvania law.

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time. *Appellant stresses the fact that decedent may not have known of his heart condition. The most uneducated and unsuspecting person, however, is as keenly aware as anyone of pains in the chest, shortness of breath, and stomach and intestinal distress.*" (Emphasis supplied.)

8. As for petitioner's claim that the court below "disregarded the distinction made by the Supreme Court of Pennsylvania between the cases in which the insured concealed either hospitalization or the names of one or more doctors that treated him and those in which the insured, *just as in the instant case*, disclosed hospitalization and the name of the doctor or doctors that treated him and failed to give all the details" (Petition, pp. 9-10), it is sufficient to point out that in this case the insured *concealed* the fact that Doctor Pierson was treating him for heart symptoms and declared that he only consulted him for "*physical examinations—no illness*" (104a, 106a).

The purpose of the questions in the Manhattan application concerning other insurance applications was to enable respondent to secure from other insurance companies information material to the risk. *Haig v. Prudential Ins. Co. of America*, 348 Pa. 614, 617, 36 A. 2d 470, 471 (1944). "Inaccurate statements as to . . . previous illness not of a trivial nature, or a denial that insurance had been sought from other companies when in fact it had been, are all to be deemed material representations." *Ratkovic v. Metropolitan Life Ins. Co.*, 126 Pa. Super. 492, 496, 191 Atl. 201, 202 (1937). That the information about the June 5th Pan American application which the insured withheld was material is obvious, as the court below necessarily recognized. If the insured had disclosed the pending Pan American application, respondent could have learned two important facts which would have affected its decision on accepting the insured as a risk: (1) that Stopper was engaged in assembling an extraordinarily large program of insurance coverage for a man of his advanced age (58a);[9] and, more important, (2) that despite repeated requests, he had failed to furnish a *current* electrocardiogram and chest X-ray to Pan American (15a-17a).

Petitioner's argument that there was evidence to support the jury's finding that Stopper was unaware of the pending Pan American application or that it had been abandoned, was properly rejected by the court. As Judge Hastie pointed out in his opinion, question 13 in part 2 of the application was in the alternative and required the insured to state whether he had "ever been examined for or made application to any life, health or accident insurance company" without obtaining a policy *or* whether he had "any application pending on which a policy has not been issued . . . ." The court necessarily concluded that his written denial of the Pan American application which was

9. As of the date of the Manhattan application for $40,000, he had already obtained $25,000 from Dominion Life, and had applied for another $50,000 from Pan American (58a, 13a-14a).

signed on June 5th in the presence of the medical examiner, was "wilfully false" because "the question was in alternative form and he must have realized that the Pan American application was covered by at least one of the stated alternatives. Cf. *Blough v. Modern Woodmen of America*, 1946, 159 Pa. Super. 249, 48 A. 2d 37; *Matovich v. Mut. Benefit, Health & Accident Ass'n.*, 1945, 157 Pa. Super. 604, 43 A. 2d 648"[10] (Petitioner's Appendix B, Petition, p. 24).

With the documentary evidence of Dr. Pierson's office records and the Pan American insurance application, the decision of the court below is unassailable on either of the two independent grounds upon which it rests. Judge Hastie's concluding paragraph fairly summarizes the case and the attitude of the Pennsylvania courts toward evidence of this character (Petitioner's Appendix B, Petition, p. 24):

> "It is our conclusion that the documentary evidence so palpably disclosed the perpetration of a fraud upon the insurer that the direction of a verdict for the defendant was the only course consistent with law and justice. We are confident that the courts of Pennsylvania would reach the same conclusion on these facts."

This case involves only the application of well established principles of Pennsylvania insurance law to the special facts in evidence. The court below correctly applied these principles in reversing the judgment with instructions to enter judgment in favor of respondent. Its decision does not merit review upon petition for certiorari.

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10. The court might also have cited in support of its conclusion *American Union Life Ins. Co. v. Judge*, 191 Pa. 484, 43 Atl. 374 (1899). In that case the insured denied in his application that any other application had been rejected or postponed. He testified that he had not been informed of the rejection of his application by the other company, although this fact had been communicated to his broker. The lower court held that even though the insured may not have known the precise status of the prior application, his failure to disclose that the application had been made and not yet acted upon was not in good faith. Its decision was affirmed per curiam by the Supreme Court.

III. Conclusion.

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX.

Excerpt From Brief for Appellee (Petitioner) Filed in the United States Court of Appeals for the Third Circuit as of No. 11,897.

The following excerpt appears on page 11 of the brief filed by petitioner in the court below:

"II. The Court May Direct a Verdict for the Insurer Only *If the Uncontradicted Documentary Evidence Shows That Statements in the Application Were False And That Insured Either Knew They Were False, or Otherwise Acted in Bad Faith in Making Them.*" [11]

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11. The italicized portion of this excerpt was quoted by the court below in its opinion (Respondent's Brief, p. 11, *supra*).